IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE SIDE

**CRIMINAL APPEAL NO. 243 OF 1994**

Shri B.H.Patel/Mr. A.P. Gujar,
Assistant Collector of Customs,
Marine & Preventive Wing, Bombay .. Appellant
(orig. complainant.)

V/s.

1. Raj Babu Pradhan,
   R/o Sea Pearl, 4th Floor,
   R.No. 401, J.P.P.Road,
   Andheri (West), Bombay-58.

2. Chimanlal L.Sanghavi (dead ).

3. Durga Shankar Trivedi,
   @ Durgadas @ Topi @ Babubhai
   @Maganlal, Prakash Bldg., ( Respondents 1
   Ground Floor, Wanganga Road, to 3 Orig.
   Welkeshwar, Bombay. accused Nos.
   to to 3)

4. The State of Maharashtra ..Respondent No.4.

Mr. D.T. Palekar for the Appellants.
Respondent Nos. 1 and 3 absent though served.
Mr. A.M. Shringarpure, A.P.P. for Respondent No.4/State.

**CORAM : S.S. PARKAR, &**
**ANOOP V.MOHTA, JJ.**
**DATE : 10TH FEBRUARY, 2005.**

ORAL JUDGMENT (**PER ANOOP V. MOHTA, J.**)

. This is an appeal filed by the Assistant Collector of Customs, Bombay, (original complainant) against the order of acquittal, dated 13/9/1993, passed by the Special Judge, Greater Bombay, whereby, the respondents (original accused Nos. 1 to 3) have been

acquitted of all the charges under section 20,23,28,29 r/w section 8(c) of Narcotic Drugs and Psycotropic Substances Act (for short NDPS Act) and Section 135 (1)(a) r/w section 135 (i)(ii) of the Customs Act (for short Customs Act).

2. By order dated 10/1/2000 the name of respondent No.2 was deleted as he was reported dead. Respondent No.1 is on bail, however, none appeared for respondent No.1 even though, served. Respondent No.3 though served by publication, never appeared in the matter.

3. Heard Mr. D.T. Palekar, the learned Advocate for the appellants and Mr. Shringarpure, the learned A.P.P. for respondent No.4-State of Maharashtra and with the assistance of the advocates, we have gone through the record of the matter. After considering the submissions made by the appellants' Counsel, we are of the view, that the order of acquittal is correct and need no interference.

4. On 10/2/1986, Mr. Desai (P.W. 2), on the basis of information and after due discussion with the superiors, went to International Air Cargo, complex at

Sahar (for short Complex) along with Intelligence Officers Mr. Dogra (P.W.1), Mr. Lokhanathsingh, Mr. Shirodkar and an informant. All were waiting at the complex plat-form, which was made for keeping packages in transit, before it stored in the warehouse. The reason to keep watch was that, as per the information, one consignment of the stainless steel utensils, containing narcotic drugs, likely to be shifted to International Air Cargo for export from the complex in question. While, watching, they noticed that (respondent-accused No.1) Raj Pradhan, was shifting some packages into the examination hall and another person Raju Sadawarte (P.W.3), a shipping Agent and representative of M/s Fairdeal Shipping Corporation, Bombay, standing near the consignment. Before the consignment could be taken to the consignment hall of the Complex. These officers apprehended respondent No.1. Raju (P.W.3) was there in connection with the Customs Clearance and other formalities, produced before the officers, the documents related to the consignment of 8 packages. Only 3 packages containing stainless steel and remaining 5 packages were found containing 70 Kgs. Hashish cakes, valued at Rs. 2,80,000/-. One package was examined in presence of two independent

panchas including P.W.3, Raju Sadawarde and Hashish cakes from the utensils were found. There was no seizure panchanama drawn on the spot. As per the prosecution, respondent No.1, came into contact with Shri Chimanlal Sanghvi (Accused No.2) (now dead). He was doing export business. On 10/2/1986 accused-respodnent No.2 went to the office of respondent NO.1 at Raheja Chambers and asked him to transport his consignment to the Complex at Sahar. The service charges were fixed at Rs.20,000/- for the same. The advance amount of Rs.3000/- was received by respondent No.1. As instructed, respondent No.1 went to Mohammedali Road and collected the consignment and carried the same to the Complex by taxi. The consignment of packages was packed by M/s Om Sai Air Fright, Andheri and was booked for Canada to be sent through KLM Flight on 12/2/1986, by Chimanlal Sanghvi (accused No.2). The documents were accordingly, prepared and therefore, Raju (P.W.3) had gone to the complex, as Shipping Agent. Chimanlal (accused No.2) in his statement, also admitted to had booked the consignment of 8 packages and that the packing of those packages was done by accused No.3. Accused No.2 admitted the offence also.

5. The charges against the accused were framed in both the cases and tried together. They pleaded not guilty. Their defence was of total denial.They also retracted alleged voluntary statements. They raised the defence that their statements recorded were under threat and coercion.

6. However, accused No.3 could not be traced and therefore, after obtaining sanction, the complaint dated 14/5/1987, against accused Nos. 1 and 2 was lodged in the Court of Chief Metropolitan Magistrate, Esplanade, Bombay.

7. On 24/10/1989 accused No.3 was arrested and in his voluntary statement admitted his involvement in the consignment under seizure. Therefore, after obtaining necessary sanction a supplementary charge-sheet came to be filed in the Special Court for N.D.P.S at Greater Bombay on 25/2/1990.

8. The Hashish and the contra band articles were sent to the office of Deputy C.C. as well as to the CRCL at New Delhi, for analysis vide letter dated

15/7/1986 (Exh. 27) Based on the positive report dated 11/9/1986,(Exh.28), provisions in question were invoked against all the three accused.

9. The prosecution led evidence of two officers Dogra (P.W. 1), Mr. Desai (P.W.2), Mr. Ali (P.W. 5) and Raju Sadawarte (P.W. 3) Customs Clearing and Forwarding Agent and Vijay Joshi (PW.4) one of the panch to the seizure panchanama, were also examined.

10. There is no dispute that 8 packages containing utensils were seized by the Custom Officers from the complex with 70 Kgs. of Hashish in question. The panchanama Exh. 52 was proved only through Vijay Joshi (P.W. 4). P.W.3, Sadawarte, a Custom Clearing Agent produced 8 documents Exh.38 to 44, which stands in the name of accused No.2. Out of 8 packages, as noted above, 5 packages containing Hashish cakes were recovered. Accused No.2 is dead. As per the prosecution, he was the main person, doing the business of import and export. Respondent-accused No.1 was hired to arrange to send consignment to the Complex at Sahar and for that he had received advance of Rs. 3000/- out of Rs. 20,000/-, as fixed. He was accordingly, went to

Mohammedali Road and collected the consignment and carried the same to the Air Cargo Complex by the taxi. The packing was done by accused No.3, who was arrested on 24/10/1989. Even though, the incident was of dated 10/2/1986.There was nothing on record to support such delay on the part of the prosecution of not arresting accused No.3.

11. We have noted that the panch witnesses have not supported the prosecution case. Vijay Joshi (P.W.4), who was a taxi driver, according to him, on 10.2.1986, one Police Officer, asked him to carry the luggage to Bombay and the packages were taken to the Marine Lines office. The officer had also asked him to sign some documents. This witness has stated that nothing happened in his presence. There is no other witness or independent corroboration about the transportation of the packages or luggages to the Marine Lines office.

12. The question is whether accused No..1 was in conscious possession of this Hashish at the relevant time. The basic evidence to connect the accused with the crime in question is revolving around the testimony of two Custom Officers Mr. Dogra, P.W. 1 and Mr.

Desai, P.W. 2 and Raju Sadawarte P.W. 3. The informant was not examined, who accompanied Mr. Desai P.W.2 and pointed out the consignment in question. Respondent-accused No.1 was standing near the consignment, where he was apprehended. At that time he with the help of two Hamals about to lift the packages to the warehouse. These two Hamals were not examined. As per reasonable belief based on information, Package No.7 was opened and they found the Hashish cakes concealed under the utensils. Accused No.1, immediately after seeing this, jumped from the platform and started running away from the spot. Therefore, it is clear that only when the package was opened, and found cakes concealed under the utensil, respondent-accused No.1 started running. However, he was chased and arrested and brought back to the spot.

13. After going through the testimony of these witnesses we also found that there are various discrepancies and variances on material aspect in so far as, accused No.1 is concerned. Merely accused No.1 jumped from the platform after seeing Hashish in package No.7, that itself is not sufficient to accept the prosecution case, that he had knowledge about the

concealed Hashish. P.W. 1, on information, prepared the gist on the piece of paper and kept in sealed packet but original information in writing was not produced in the Court. Mr. Desai (P.W. 2) has stated that Raju Pradhan - accused No.1, jumped the platform and tried to ran away. Therefore, Mr. Dogra and Mr. Lolknathsingh (not examined), chased him and caught near one colony, which was 800 meters away from the place. They brought accused back at place of the incident.

14. By that time as crowd gathered there, they could not complete the examination. Therefore, all these packages along with two persons were taken to their office at Marine Lines. The seizure panchanama was not drawn on the spot, immediately, after opening of package No.7 and or discovery of Hashish in the said package. Some packages were transported in the taxi of P.W. 4 and also some in their departmental car. One panch and Raju Pradhan (A1) were in the departmental car. Raju P.W. 3 was in the taxi. They went to the office at Marine Lines. As noted above P.W. 4 Vijay not supported the prosecution case to link these circumstances to show that all these packages were brought from the Air Port to Marine Lines in his taxi,

by the officers. Even Raju P.W. 3 could not support the case of the prosecution.

15. The detailed inventory as per prosecution was held and seizure panchanama was prepared in the Marine Line office. Samples were also collected from the respective 35 Hashish cakes. The prosecution failed to support the case that the pacnhas were present through out, during the preparation of the panchanama. This witness has answered in the cross-examination that the Export Promotion Council (for short Council), who inspected the packages, had issued two certificates, dated 29/1/1986 and 30/1/1986. The packages were lying at the place of inspection with the seal of the Council. The seal of Celluloid was also there. When the packages were examined the seals and the strips were in -act. Therefore, it is very clear that when the packages were opened it was duly certified by the competent authority of having inspected the same. It is no where placed on the record that in those packages, Hashish was concealed when and on what time and by whom. He further admitted that no seizure panchanama of the packages was drawn on the spot, even with the help of police, as a crowd of more than 40 to 50 people was gathered there. P.W.1,

was unable to tell which of the two panchas were sitting in the taxi, as they were unknown to him. This officer later on not conducted the investigation, as he was transferred from the office.

16. P.W. 2, Narayan Desai, Superintendent of Central Excise, was in charge of Unit III at the relevant time. As narrated by P.W. 1, went to the Complex and when accused No.1 started lifting the packages along with the help of Hamals, they surrounded Sadawarte (P.W. 3) and asked him to produce the documents and further asked Sadawarte and accused No.1 to open the package. Package No.7 was opened. P.W. 2 has also corroborated these events as narrated by P.W.1. As per this witness his officers chased accused No.1 and brought him back to the spot. As there was crowd, they could not open all the packages for the examination and could not draw the panchanama on the spot. The voluntary statement of accused No.1 was recorded on 10/2/1988, at Exh.21, which was counter singed by P.W.2, Desai. ( P.W.3)- Sadawarte was not arrested and asked to come again on the next day. Thereafter summons were served. Further statement of accused No.1 was recorded on 11/2/1986 at Exh.20. Accused No.2 was also brought

to the office after searching his house. His voluntary statement under Section 108 of Customs Act was also recorded by P.W.2. The samples were sent on 15/7/1986 to Delhi for chemical analysis, report of which was received on 11/9/1986.

17. P.W. 2 has stated that the information was reduced into writing on a piece of paper and same was in the hand writing of the informant. The said piece of paper was kept in sealed cover (envelope). This witness has admitted that he had not seen sealed cover, in which information was kept. The prosecution has failed to place on the record to support their contention that information, which they had received was reduced into writing, and the contents of the same, as contemplated under section 41 of NDPS Act.

18. P.W. 2. has admitted that he had no knowledge whether certificate of the inspecting Council was necessary before goods could be exported. P.W. 2 has also admitted that all 8 cartoons were inspected by the officers of the Council and it was duly sealed. All the 8 cartoons were having seals of the Council at the time of the seizure. The Council had inspected the said 8

cartoons on 28/1/1986 and 30/1/1986 and sealed by two officers, whose statements were also not recorded by the prosecution. The seals of Export Council were not placed on the record. P.W. 2, unable to remember the officer who opened the package No.7 on the spot. P.W. 2 has stated that typed panchanama was drawn by P.W. 1 at his own chamber, on 10/2/1986 and it was not in the room of P.W.2. P.W. 2 has also admitted that it is not mentioned in the panchanama, as to which particular package of Hashish was recovered from which particular cartoon. P.W. 2 has admitted that accused No.1 did not attempt to escape when the page No.7 was being opened and utensils were taken out from the package. Accused No.1 started running away from the platform only after seeing something other than the utensils in the package. This witness could not tell the presence of panchas when the contents of package No.7 were exhibited. One panch P.W. 4 was declared hostile and other panch was not examined. This witness could not tell from which cartoon sample of Hashish cake were drawn. He stated that the cake that was taken away by Mr. Pali and other cakes were also not sealed and labelled with the signatures of the panchas. There was no mention in the panchanama that one cake was taken by Mr. Pali and

other cakes were taken by his representative. P.W. 2 has stated that when accused NO.1 jumped from the platform and started running away, officer Mr. Lokhnathsingh chased him. Mr. Dogra continued to remain there. He did not run after accused No.1. This witness has also admitted that they had not taken the sample from each and every 8 cakes (70 Kgs.). The cakes were carried by Mr. Pali was not sealed in the packet while sending it to Deputy Commissioner of Central Excise, no signature of accused No.1 was taken on the sample. This witness has further stated that part of the cake was drawn on 15/7/1986 in the office. He unable to remember in whose presence it was drawn. He stated that none of the accused were present at that time. This witness further stated that they did not know from where the officer brought cake for drawing the sample. There was no documentary evidence to show that the same cake was received from Mr.Pali. There is no correspondence entry pointed out in respect of the cake, which was carried by Mr. Pali.This witness has admitted that on envelope report 11/1//C, there was no signatures of panchas. This witness has admitted that accused No.1 has retracted his statement. This witness has admitted that no independent witness was present when he recorded

the statement of accused NO.2, as per section 108 of Customs Act, as the presence of independent witness was not necessary.

19. P.W. 3, Raju Sadawarte, who was working as a Custom Clearing and Forwarding agent. On 10/2/1986, at the spot in question, P.W. 1 and P.W.2 in their statements stated the role of P.W. 3 Raju. This witness has denied various portions, as recorded in his statement Exh.40. This witness has also admitted that officers were guiding and dictating, the portions marked "a" "b" "c" "d" "e" "f" and also last paragraph of the statement. All statements are were in his own handwriting. This witness has admitted that all these documents regarding 8 packages were handed over to him by accused No.2. Therefore, this witness also nowhere supports the prosecution case against the accused in view of the various contradictory statement, as referred above.

20. P.W. 4 Vijay Joshi, Taxi driver, in whose taxi 8 packages along with some officers went to Marine Line office. This witness was declared hostile. In cross-examination also, he nowhere supported the

prosecution case. Admittedly, there was no seizure panchanama made on the spot at the complex. The panchanama of seizure in question were prepared at the office. There is nothing to connect the shifting of these 8 packets from Air Port to Marine Line office by any independent witness.

21. P.W. 5 Mr. A.R. Ali, was working as Superintendent of Central Excise Customs, arrested accused No.3 and recorded the statement of accused No.2. This officer has also recorded the statement of accused No.2 on the same day. This witness has admitted that before recording the statement of accused No.3 he did not caution him that the statement he would be making, would be used against him. The statement was recorded by the officers. This witness was not aware that accused No.2 and 3 had retracted their statement. He was not concerned with the investigation thereafter.

22. After considering all these material evidence, as well as documents placed on the record, we are also of the view that the prosecution failed to establish that the accused was in actual possession of these packages and was conscious about 70 Kgs. Hashish in

question. There is no corroborative evidence to support this aspect even by P.W.1, P.W.2, or P.W. 3. Merely accused No.1 was present on the spot, that itself cannot be the reason to hold that he was in actual and conscious possession of 70 Kgs.Hashish. We cannot over look the admitted position, that these packages were sealed by the Council on 29/1/1986 and 30/1/1996 and these seals were in tact and existing when opened for the first time on the date of incident. The learned Judge rightly observed in para 17, variance in the version of two witnesses namely P.Ws.1,2 and 3.

PARA 17;

> "Thus, the version of these two witnesses is totally at variance. Mr. Dogra, P.W. 1 speaks about calling two panchas before the accused No.1 came to be apprehended where as according to Mr. Desai, P.W. 2 the panchas were called only after the accused No.1 was apprehended. At any rate, in this respect, panch witness does not support, nor Raju Sadawarte P.W. 3. Though Mr. Desai, P.W. 2, speaks that they surrounded the accused No.1 and others only when they saw the accused No.1 lifting the packages with the help of two Hamals, this version is not supported by Mr. Dogra, P.W. 1. Thirdly, accordingly Mr. Desai, P.W. 2, the accused No.1 jumped from the platform and started running away only after the accused No.1 saw the recovery of Hashish cakes. This however, is not supported by Mr. Dogra P.W. 1, according to whom soon after the contents of package No.7 were started to be examined, the accused No.1 jumped and he was brought to the spot. There is

> also no unanimity in the version of these two witnesses as to had chased and brought the accused No.1 to the spot. According to Dogra, P.W.1, he himself and Lokhnath had chased and brought accused No.1 to the spot. However, Mr. Desai, P.W. 2, states that Dogra continued to remain there and it was Loknathsingh and one more officer ran after the accused No.1 and brought him back to the spot. These contradictions assume importance because it is the case of the prosecution that the accused No.1 was standing there with the packages and he had knowledge about the Hashish concealed in the packages. Now it appears that the two witnesses, more particularly, Mr. desai P.W. 2, has attempted to make improvement in order to show that the accused No.1 had knowledge about the contents. However, when the two witnesses have contradicted each other, materially on the point of accused No.1 being apprehended, when he was about to lift the packages and also about the accused No.1 started running away, after seeing the recovery of Hashish cakes. The evidence of these two witnesses, therefore, does not inspire confidence on these two aspects. There should have been some corroboration from any independent witness. But, that corroboration is absent. The panch witness Vijay Joshi, P.W. 4 does not support the prosecution and Raju Sadawarte, P.W. 3, also does not support the prosecution. On these aspect, therefore, the evidence led by the prosecution in order to show that the accused No.1 was conscious about the contents of the packages is not believable, even though their evidence can be believable on the point of presence of accused No.1 on the platform."

23. We have also noted that all the accused including respondent No.1- accused No.1 retracted so called voluntary statement and denied all the charges in the statements recorded under Section 313 of Cr.P.C.

Therefore, what is required is other material or corroborative material to convict the accused based on such retracted statements. As noted there is nothing on record to corroborate the case of prosecution. According to us also, the prosecution failed to prove the conscious and actual possession of Hashish in question, to convict accused No.1 and 3 specially because of unsatisfactory connecting evidence and various lacunas found in the testimony of the witnesses.

24. We are not in agreement with the findings given by the learned Judge, in so far as the aspect of conviction cannot be based on the retracted statement recorded under Section 108 of Customs Act. As now, in view of the settled law such retracted statement can be relied for conviction, however, it is subject to the basic requirement that it should be corroborated by other material. However, in the present case, as already observed there were no sufficient corroborative or material evidence to connect and sustain the prosecution case. Therefore, such retracted statements cannot be the basis, in the present facts and circumstances of the case, to convict the accused.

25. After considering the material, as well as, documents placed on the record, according to us, the prosecution has failed to link the accused with the crime for want of various connecting links. There are various doubts created in the prosecution case Therefore, we are also of the view that there is no case made out by the prosecution to interfere with the reasoning given by the learned Judge of acquitting all the accused of all the charges.

26. There is no substance in the appeal. The appeal is dismissed.

**[ S.S. PARKAR, J. ]**

**[ANOOP V. MOHTA, J.]**

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**CORAM : S.S. PARKAR, &**
**ANOOP V.MOHTA, JJ.**
**DATE : 10TH FEBRUARY, 2005.**

P.C.

. For the reasons separately recorded the following order is passed;

. There is no substance in the appeal. The appeal is dismissed.

**[ S.S. PARKAR, J. ]**

**[ANOOP V. MOHTA, J.]**